

Sakri bin Yusuf v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05-10
OF 2007

AHMAD MAAROP, RAMLY ALI AND APANDI ALI JJCA
31 MARCH 2011

B

Criminal Procedure — Trial — Failure to cross-examine prosecution witnesses on crucial issues — Appellant convicted of trafficking in dangerous drugs — Defence that he was delivering red plastic bag containing ‘jamu’ for ‘X’ when arrested by police — Prosecution witnesses not asked any question about ‘X’ or red plastic bag during cross-examination — Whether defence’s story an afterthought and bare denial of prosecution’s case

C

D

The appellant was convicted and sentenced to death by the High Court after it found him guilty under s 39B(1)(a) of the Dangerous Drugs Act 1952 of trafficking in 4,278g cannabis. According to the prosecution’s evidence, a police party, acting on information, waited in ambush at a bus stop to nab a suspected drug trafficker. They noticed the appellant walking towards the bus stop from a lane at the rear carrying a plastic bag. When the police party approached him and identified themselves the appellant threw the plastic bag onto the road. When the police picked up the bag and opened it in the presence of the appellant they found it to contain the cannabis and the appellant was arrested. In his defence, under oath, the appellant said on the day in question he had borrowed a car from one Abdul Gamal Nasir and while driving to Masai received a telephone call from the said Nasir requesting his help to deliver a red plastic bag in the rear seat of the car to a blue Proton Saga waiting near the bus stop. Nasir told him the bag contained ‘jamu’. The appellant said after he arrived at the bus stop he parked the car some distance away, took the red plastic bag and walked to the blue Proton Saga. A man got out of the vehicle and, after confirming the appellant’s identity, grabbed and handcuffed him. At that moment other policemen rushed to the scene. The appellant appealed to the Court of Appeal against his conviction and sentence.

E

F

G

H

Held, dismissing the appeal and affirming the conviction and sentence:

- (1) It was important for an accused to put his essential and material case to the prosecution witnesses in cross-examination. Whenever an opponent declined to avail himself of the opportunity to put his essential and material case in cross-examination, it followed that he believed the testimony given could not be disputed at all (see para 18).
- (2) The character Abdul Gamal Nasir and his role in asking the appellant to deliver a red plastic bag to the blue Proton Saga at the bus stop were

I

A crucial elements in the defence. If they were true, there was no reason why nothing at all about Nasir or about the red plastic bag was asked of the prosecution witnesses when they were cross-examined (see para 19).

B (3) The court had no choice but to conclude the defence's story about Nasir requesting the appellant to deliver jamu to a blue Proton Saga waiting near the bus stop was a mere afterthought (see para 19).

C (4) The appellant's defence was nothing but a bare denial. His evidence was diametrically opposed to the evidence of PW4 and PW5 and implied that they colluded to give false evidence to frame him up. But there was no evidence the appellant knew any of the police officers who arrested him or that he had had any quarrel with any of them prior to the date of his arrest. There was thus no plausible reason for them to want to falsely implicate him (see para 21).

D **[Bahasa Malaysia summary]**

E Perayu telah disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi setelah mendapatinya bersalah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 kerana mengedar 4,278g kanabis. Menurut keterangan pendakwaan, sepasukan polis, yang bertindak atas maklumat telah menunggu untuk serang hendap di perhentian bas untuk menangkap pengedar dadah yang disyaki. Mereka melihat perayu berjalan ke arah perhentian bas dari lorong belakang membawa beg plastik. Apabila pasukan polis menghampirinya dan memperkenalkan diri mereka perayu telah membaling beg plastik itu ke atas jalan. Apabila polis mengangkat beg itu dan membukanya di depan perayu mereka mendapati ia mengandungi kanabis dan perayu telah ditangkap. Dalam pembelaannya, dengan bersumpah, perayu menyatakan pada hari yang dipersoalkan itu dia telah meminjam kereta daripada Abdul Gamal Nasir dan semasa memandu ke Masai telah menerima panggilan telefon daripada Nasir meminta bantuannya menghantar beg plastik berwarna merah di kerusi belakang kereta ke Proton Saga berwarna biru yang sedang menunggu di perhentian bas. Nasir telah memberitahunya beg itu mengandungi jamu. Perayu berkata setelah dia tiba di perhentian bas dia telah meletakkan keretanya beberapa jarak daripada situ, mengambil beg plastik berwarna merah itu dan berjalan ke arah Proton Saga berwarna biru itu. Seorang lelaki telah keluar daripada kenderaan dan, setelah mengesahkan identiti perayu, memegang dan menggarinya. Pada masa itu polis lain menyerbu ke tempat kejadian. Perayu merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman.

I **Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman:

- (1) Adalah perlu bagi tertuduh mengemukakan kesnya yang penting dan material kepada saksi-saksi pendakwaan dalam pemeriksaan balas. Apabila pihak lawan enggan memberikan dirinya peluang untuk

mengemukakan kesnya yang penting dan material dalam pemeriksaan balas, adalah diikuti bahawa dia mempercayai testimoni yang diberikan tidak boleh dipertikaikan langsung (lihat perenggan 18).

A

- (2) Perlakuan Abdul Gamal Nasir dan peranannya meminta perayu menghantar beg plastik berwarna merah ke Proton Saga berwarna biru di perhentian bas merupakan elemen-elemen penting dalam pembelaan. Jika benar maka tiada alasan kenapa tiada apa-apa langsung tentang Nasir atau tentang beg plastik berwarna merah disoal oleh saksi-saksi pendakwaan semasa mereka diperiksa balas (lihat perenggan 19).

B

- (3) Mahkamah tiada pilihan selain membuat kesimpulan cerita pembelaan bahawa Nasir meminta perayu menghantar jamu itu ke Proton Saga berwarna biru yang menunggu di perhentian bas yang hanya merupakan suatu yang telah difikirkan kemudian (lihat perenggan 19).

C

- (4) Pembelaan perayu tidak lebih daripada penafian sahaja. Keterangananya bercanggah dengan keterangan PW4 dan PW5 dan membawa maksud bahawa mereka bersetuju untuk memberikan keterangan palsu untuk mengenakannya. Namun tiada keterangan bahawa perayu mengetahui tentang mana-mana pegawai polis yang telah menangkapnya atau bahawa dia telah bergaduh dengan mana-mana daripada mereka sebelum tarikh tangkapannya. Oleh itu tiada sebab jelas untuk mereka yang ingin mengenakannya secara palsu (lihat perenggan 21).]

D

E

Notes:

For a case on failure to cross-examine prosecution witness on crucial issue, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5160.

F

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (folld)

Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Balachandran v PP [2005] 2 MLJ 301, FC (refd)

Gunalan all Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)

Nasaruddin bin Daud & Anor v PP and another appeal [2010] 6 MLJ 35, CA (refd)

Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)

Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)

PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)

G

H

I

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), 39B(2)

Appeal from: Criminal Trial No 45–36 of 2000 (High Court, Johor Bahru)

A

S Vijayaretnam @ Veizay (R Subash with him) (Veizay & Co) for the appellant. Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

B **Ahmad Maarop JCA:**

CHARGE

C

[1] The appellant — Sakri bin Yusuf ('Sakri') was charged in the High Court with trafficking in 4,278g of cannabis at about 4.30pm on 5 April 2000 at the bus stop Jalan Mawar, Pasir Gudang, Johor Bahru ('the bus stop'), an offence under s 39B(1)(a) of the Dangerous Drugs Act ('DDA') and punishable under s 39B(2) of the DDA.

D

[2] At the end of the trial, Sakri was found guilty of the charge, convicted and sentenced to death. He preferred an appeal to this court.

THE PROSECUTION'S CASE

E

[3] The case for the prosecution is straight forward. The substance of the evidence led by the prosecution is as follows. On 5 April 2000, acting on information received, C/Insp Charun led three teams of police officers to the bus stop to set up an ambush to ensnare a suspected drug trafficker. Det Sub Inspector Zulkifli bin Idrus (PW4), L/Kpl Mohd Arif bin Alias (PW5) and four other police personnel in the first team took up their position opposite the bus stop. The second and the third groups took up their respective positions at Jalan Mawar 2 and Jalan Mawar 1.

F

G

[4] At about 4.30pm on that day, PW4 noticed Sakri emerged from a lane at the rear of the bus stop and walked towards the front of the bus stop carrying a plastic bag in his right hand. PW4, followed closely by PW5 and the other police personnel in his team, came out of his ambush position and closed in on Sakri, and identified himself as a police officer. Sakri threw the plastic bag he was carrying on to the road. PW4 picked up the plastic bag and opened it in the presence of Sakri. PW4 found five newspaper packages in the plastic bag. On examining the packages, PW4 found each of them to contain a slab of compact plant material wrapped in transparent cellophane tape. PW4 seized the five packages of the plant material as well as the plastic bag and detained Sakri. PW4 brought those exhibits and Sakri to the IPK. There, he lodged a police report vide Pasir Gudang report No 1400/2000 and issued a search list (P29) to Sakri. PW4 marked the exhibits by putting his signatures on them. At about 9pm on the same day PW4 handed the exhibits over to the investigation officer, C/Insp Adnan bin Buayurin (PW8). PW8 made his own markings on the

H

I

exhibits. PW8 then brought all the exhibits back to his office in IPD Johor Bahru and placed them in his cabinet under lock and key. On 7 April 2000 he packed the five packages of compact plant material into a box which he marked 'E' and sealed it with PDRM 423 seal. Thereafter, on the same date he handed the exhibits over to the chemist Shadiah bt Mohamed (PW1). PW1 analysed the five slabs of compact plant material in the five newspaper packages and found them to contain a total of 4,278g of cannabis — a dangerous drugs as defined under the DDA.

A

B

[5] The prosecution attempted to introduce Sakri's cautioned statement (ID35) but after conducting a trial-within-trial the learned trial judge ruled the statement to be inadmissible in evidence. Therefore, nothing more will said about ID35 in this judgment.

C

[6] At the close of the case for the prosecution, the learned trial judge held that he was satisfied that the prosecution had made out a prima facie case. He called upon Sakri to enter on his defence.

D

SUBMISSION

E

[7] Before us learned counsel for Sakri submitted on a number of grounds. We will deal with those grounds in turn although not necessarily in the order those grounds were submitted by learned counsel.

NO MAXIMUM EVALUATION OF EVIDENCE

F

[8] Learned counsel submitted that the verdict against Sakri could not stand because there was no indication that the learned trial judge had made a maximum evaluation of the evidence before him. It is true that nowhere in the record of appeal it is recorded that the learned trial judge said that he had carried out a maximum evaluation of the evidence, although in fairness to him, at p 69 of the record of appeal it is recorded that he was satisfied that the prosecution had made out a prima facie case. It is unfortunate that his demise had deprived us of the grounds of his judgment in this case. But that does not necessarily mean that the verdict against Sakri cannot stand. Fortunately for justice, the learned trial judge had left us with a complete record of appeal. We have the power to review or re-evaluate all the evidence available to us in the record of appeal and subject it to critical examination in considering whether the verdict against Sakri can stand or otherwise. This is clear from the Federal Court decision in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800. We have undertaken the re-evaluation and critical examination of the evidence as aforesaid and we will in a moment set out our conclusion and reasoning for the same.

G

H

I

A CONTRADICTION BETWEEN THE EVIDENCE OF PW1 AND PW8
ON THE GROSS WEIGHT OF THE EXHIBITS

B [9] Learned counsel submitted that in his evidence in answer to a question by the trial judge, PW1 testified that the gross weight of the substance sent to him was 4,387.2g (p 18 of the appeal record). This, learned counsel argued contradicted the evidence of PW8 who said that the gross weight of the exhibits was 4,465g, creating a gap in the prosecution's case. We do not think that the discrepancy relating to the gross weight alone as such is sufficient to destroy the prosecution's case. We cannot expect the initial weighing by the police to be as accurate as that done by the chemist (see *Gunalan all Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551, at p 572). Unlike PW1 who used analytical balance which had been calibrated, there is no evidence to show the type of balance used by PW8 and whether it was calibrated before use. D Anyway, it is not the gross weight for which Sakri was charged. He was charged with trafficking in 4,278g (ie the nett weight) of cannabis. In our view, the more important question for our decision arising from the above submission is whether the substance analysed by PW1 (in respect of which Sakri stood charged) was the same substance recovered by PW4 (see *Gunalan all Ramachandran v Public Prosecutor*). In our judgment, the answer to this question must be in the affirmative. PW4 testified that between the time he seized the exhibits until the time he handed them over to PW8 the exhibits were under his control. These exhibits were:

- F (a) the plastic bag (P10) which was thrown away by Sakri; and
(b) five slabs of compact plant material wrapped in cellophane tape (P13, P17, P21, P25 and P28) in five separate newspaper packages (P12, P16, P20, P24 and P27) found in the plastic bag P10.

G PW4 had marked all those exhibits by putting his signature on them. Those marks had enabled him to identify positively the exhibits in court. In this regard he also identified photographs ID5A — I as showing the exhibits which he had recovered in this case. On the same date (5 April 2000), at about 9am PW4 handed the exhibits to PW8. Both of them executed the document '*Serah Menyerah Barang-Barang Kes*' (P30) evidencing the handing over of the exhibits. H PW8 made his own markings on the exhibits as follows:

- I (a) He marked the plastic bag (P10) 'E1',
(b) He marked the five newspaper packages (P12, P16, P20, P24 and P27) 'A', 'B', 'C', 'D' and 'F', and
(c) He marked the five slabs of compact plant material wrapped in cellophane tapes (P13, P17, P21, P25 and P28) 'A1', 'B1', 'C1', 'D1' and 'F1'.

The markings made by PW8 had enabled him to identify positively all those

exhibits in court. After taking photographs of the exhibits, PW8 packed them in a box (P9), which he then wrapped using the wrapper (P7). He then put the marking 'E' on the box and sealed it with the PDRM 423 seal. He kept the box in his cabinet under lock and key.

A

[10] On 7 April 2000, PW8 handed the box marked 'E' containing the exhibits to PW1 who gave him an official acknowledgement receipts (P3). PW1 in turn confirmed receiving the said exhibit (the sealed box marked E). He registered it and assigned the lab No (JB) FOR 681/00-0). On examining the box, PW1 found it to contain five newspaper packages (marked A, B, C, D and F) each containing a slab of compact plant material wrapped in cellophane tape. PW1 found that the five slabs of compact plant material had been marked A1, B1, C1, D1 and F1. The markings made by PW4 and PW8 as well as his own markings had enabled PW1 to identify positively those exhibits in court. He examined and analysed the five slabs of compact plant material and found them to contain a total of 4278g of cannabis.

B

C

D

[11] We find that the prosecution had called as witnesses all the persons through whose hands the exhibits passed and all of them had positively identified all the exhibits. There is thus no break in the chain of evidence relating to the exhibits. Having re-evaluated and undertaken critical scrutiny of the evidence as aforesaid, there is no doubt in our mind as to the identify of the incriminating exhibits in this case. We are satisfied that the five slabs of compact plant material analysed by PW1 were the same five slabs of compact plant material recovered by PW4 at the scene of Sakri's arrest. PW1 had given evidence on his qualification and experience. We find him to be a competent witness who possessed the necessary credentials and expertise to have analysed the five slabs of compact plant material. PW1 had also given evidence on how he carried out the analysis of the exhibits including the various tests done by him. There is nothing inherently incredible about PW1's evidence and we accept his evidence on his examination and analysis of the exhibits as well as his eventual conclusion. There is no doubt in our mind that the five slabs of compact plant material contained 4,278g of cannabis, a dangerous drugs defined under the DDA.

E

F

G

[12] The next question is whether Sakri did traffick in the said dangerous drugs? This brings us to the next point raised by Sakri's counsel in his submission.

H

CONTRADICTION BETWEEN THE EVIDENCE OF PW4 AND PW8

I

[13] The complaint here was that there was a material contradiction between the evidence of PW4 and that of PW8. Learned counsel submitted that PW4's evidence that Sakri threw the plastic bag (P10) he was carrying was

- A contradictory to PW8's evidence in re-examination when he said that '*dalam kes ini barang kes dijumpai pada OKT*' (see p 65 of the appeal record). We are unable to accept the submission. That piece of evidence of PW8 must not be taken in isolation and out of context. That piece of evidence was given by PW8 when he was re examined by the learned deputy public prosecutor in the
- B context of the challenge by the defence on the existence of motorcar JEQ 8145 and that the offending exhibits were found in that car. The relevant part of PW8's evidence in re-examination in which that piece of evidence occurred is as follows:
- C Saya tidak terima daripada Pegawai Serbuan dan anggota yang terlibat dalam kes ini mengenai kereta JEQ 8145.
Dalam kes ini barana kes dijumpai pada OKT.
Tidak ada dalam siasatan saya barang kes dijumpai di dalam kereta JEQ 8145.
- D Dalam siasatan saya, saya tidak terima apa-apa maklumat OKT ada guna kereta JEQ 8145.
Saya tidak ingat isi kandungan percakapan beramaran OKT Sebagai 1.0. dalam kes ini, saya tidak pernah menganiaya OKT dan tidak ada sebab saya hendak menganiaya OKT.
- E The defence suggested to PW8 that in the course of his investigation Sakri told him that the offending exhibits were found in the said car. PW8 disagreed with the suggestion. So, what PW8 actually did in re-examination was to emphasise the point that his investigation did not reveal that the offending exhibits were found in motorcar JEQ 8145. Although PW8's evidence did not corroborate
- F PW4's evidence that Sakri threw the bag he was carrying, PW8's evidence that '*dalam kes ini barang kes dijumpai pada OKT*' is not altogether untrue in the light of PW4's evidence that the offending exhibits in the plastic bag (P10) was indeed with Sakri when he was carrying it before throwing it onto the road upon being accosted by PW4! Anyway, in our view what is more important is
- G that the evidence given by PW8 as aforesaid is hearsay. He was not at the scene of Sakri's arrest. So, what PW8 said was actually his own conclusion based upon his investigation. The truth as to what happened was established by the evidence of PW4 — the arresting officer. We found his evidence on what happened in the ambush — leading to Sakri's arrest and the seizure of the
- H offending exhibits was unshaken and not inherently improbable. As a matter of law PW4's evidence requires no corroboration. Nevertheless, we found that his evidence on what happened in the ambush was corroborated by the evidence of PW5 who was with him when he accosted and arrested Sukri and retrieved the plastic bag (P10) thrown onto the road by Sakri. Thus, upon the re-evaluation and critical examination of PW4 and PW5's evidence we accept their version
- I on what happened on the day in question. The conclusion which we have made inevitably mean that we reject learned counsel's submission about the alleged existence of motorcar JEQ 8145 at the scene and that the offending exhibits were found therein.

[14] To prove the offence of trafficking, the prosecution could prove affirmatively that an accused was in possession of the proscribed drugs and then invoke the presumption of trafficking under s 37(da) of the DDA, or it could establish its case of trafficking by proving any of the acts of trafficking as defined under s 2 of the DDA (see *Nasaruddin bin Daud & Anor v Public Prosecutor and another appeal* [2010] 6 MLJ 35 (CA)—affirmed by the Federal Court in Criminal Appeal 05–13 of 2010 (W) and 05–28 of 2010(W) and, *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560, (FC)). Based on the evidence of PW4 and PW5 we find that on the day in question, from his ambush position, PW4 observed Sakri emerge from a lane at the rear of the bus stop carrying a plastic bag in his right hand. PW4 came out of his ambush position, and followed closely by PW5 and the other police personnel in the first team, PW4 closed in on Sakri, and identified himself as a police officer. Sakri throw the plastic bag (P10) onto the road. PW4 retrieved the plastic bag, opened it in the presence of Sakri and found it to contain on five newspaper packages each of which contained a slab of compact plant material wrapped in transparent cellophane tape. The evidence established that Sakri was caught red handed carrying a plastic bag containing five slabs of cannabis weighing 4,278g. He was clearly in custody and control of the proscribed drug. The next crucial question is did he have knowledge of the drugs found in his custody and control? More often this is a matter of inference from proved facts. Again the facts proved by the evidence of PW4 and PW5 provides the answer. Their evidence proves that on being accosted by PW4, Sakri threw the plastic bag he was carrying onto the road. In our judgment the evidence of PW4 and PW5 established the nexus between Sakri's conduct which we have just referred to and the five slabs of cannabis which were in his custody and under his control. In other words, Sakri's conduct was influenced by the fact in issue as explained by the Federal Court in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19. The facts established by the evidence of PW4 and PW5 lead us to only one inference — at the material time Sakri had knowledge of the drugs in his custody or under his control. The prosecution had therefore proved affirmatively that Sakri had in his possession the five slabs of cannabis without invoking the presumption under s 37(da) of the DDA, and since the cannabis weighed more than 200g, the presumption under s 37(da) of the DDA is triggered, and Sakri shall be presumed, until the contrary is proved to be trafficking in dangerous drugs, to wit, 4,278g of cannabis. We are satisfied that the evidence against Sakri at the close of the prosecution was sufficient to convict him if he was to remain silent on being called to enter on his defence (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301). The learned trial judge was right when he held that the prosecution had established a prima facie of trafficking against Sakri and in calling upon him to enter on his defence.

THE DEFENCE

[15] Sakri gave evidence on oath and called three other witnesses to testify for the defence.

- A [16] First, we deal with the evidence of the other witnesses who testified for the defence. Syed Fauzinor bin Syed Derahim (DW3), an officer attached to the record office of the Shah Alam JPJ testified that in the year 2000 the registered owner of the car JEQ 8145 was Abdul Gamal Nasir bin Abdul Latif. Haslinda bt Atan (DW2) was a clerk attached to Tetuan Ashikin, Norman Fernandez & Associates the legal firm which represented Sakri in the trial in the court below. DW2 testified that she obtained Abdul Gamal Nasir's last known address from the National Registration Department and sent two registered letters dated 29 May 2006 and 21 June 2006 respectively to Abdul Gamal Nasir's last known address but the two letters were returned undelivered. DW2 also wrote letters to the local newspapers — Harian Metro, Berita Harian, Utusan Malaysia and Kosmo requesting for assistance to locate Abdul Gamal Nasir. DW2 was called obviously to show the attempts made by the defence to locate Abdul Gamal Nasir to get him to testify for the defence. All the attempts proved futile. Mazlin Mustafa (PW4) who was attached to the National Registration Department testified she supplied the last known address of Abdul Gamal Nasir requested by Tetuan Ashikin Norman Fernandez.

- E [17] The thrust of Sakri's defence comes from his own evidence. The substance of his evidence is as follows. On 5 April 2000 he resided at a squatter house, behind the JPJ, Kebun Teh, Johor Bahru. On that date at about 1.30pm or 2pm he borrowed motorcar No JEQ 8145 (a white Proton Iswara Aeroback) ('the car') from his friend one Abdul Gamal Nasir ('Nasir'). He took the car from Nasir's house was. He could not remember where Nasir's house was. He then drove in the direction of Masai. His reason for going to Masai was to look for a job and get a lot to trade in the night market (pasar malam) as he wanted to sell cloth brought from Kelantan. He said he had gone to look for the pasar malam lot in Masai because it was difficult to a lot in Johor Bahru. According to Sakri, while driving the car to Masai, he received a telephone call from Nasir. Nasir asked for his help to deliver a red plastic bag ('the red plastic bag') which was on the rear seat of the car to a blue Proton Saga which was waiting near the bus stop. Sakri said he asked Nasir '*apa barang*'. Nasir told him that it was '*jamu*'. After receiving the call from Nasir, Sakri proceeded to the bus stop. When he arrived at the bus stop he saw the blue Proton Saga waiting for him. He stopped Nasir's car alongside the blue Proton Saga. He honked the horn.
- H The person in the blue Proton Saga acknowledged him by raising his hand. Sakri then drove the car and parked it at the rear of the bus stop. The distance between the place where he parked the car and the bus stop was about 50 meters. After parking the car, he took the red plastic bag and walked in the direction of the blue Proton Saga which was then parked in the bus stop area.
- I When he reached the blue Proton Saga, a man alighted from it and asked him, '*adakah kamu Sakri*'. Sakri replied, '*Ya*'. Whereupon the man grabbed and handcuffed him. Then, a number of other police personnel rushed to the place where he was arrested. The police personnel, including the man who arrested him was not wearing uniform. They did not identify themselves as police

personnel. Sakri assumed that they were police personnel. Continuing his evidence, Sakri said, when he was arrested he released the red plastic bag because he was scared as it did not belong to him, '*semasa saya ditangkap saya lepaskan beg plastik merah sebab saya takut sebab beg itu bukan saya punya*'. Sakri said the police asked him where his car was, and then dragged him to the car. They took the car key from his pocket and then searched the car. According to Sakri, he saw the police take out a black hand bag and another plastic bag from the boot of the car. The police did not open the plastic bag in his presence. Neither did they ask him about the plastic bag. Then he was placed in a van and taken to IPK Johor Bahru. The plastic bag taken from the boot of the car as well as the red plastic bag were also placed in the van. Sakri said that at IPK Johor Bahru, the things taken from the boot of the car and the red plastic bag were shown to him. He was asked whether those things belonged to him and he replied that they belonged to Nasir. He also told the police that he borrowed the car from Nasir. Sakri denied that the things found in boot of the car and the red plastic bag belonged to him. Cross-examined by learned deputy Public Prosecutor, he denied that he was holding the plastic bag which contained cannabis. He also denied that since he knew that plastic bag contained cannabis he became scared when the police introduced themselves. Under re-examination, Sakri said the bag (P10) was found in the boot of the car. He denied that he was holding the plastic bag P10 when he was arrested.

[18] The nature of the defence is to be ascertained not only from the evidence of the accused himself but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's counsel at the close of the trial. It is therefore important for the accused to put his essential and material case to the prosecution witnesses in cross-examination. This is a principle of essential justice. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that is merely a technical rule of evidence. It is a rule of essential justice (see *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ at pp 193-194). The purpose of the defence having to put its case to the material witness for the prosecution was explained by the Federal Court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209:

In a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence.

- A [19] The character Abdul Gamal Nasir and his role in requesting Sakri to deliver the red plastic bag to the blue Proton Saga at the bus stop was a very crucial element in Sakri's defence. If it is true, there was no reason why it was overlooked by the defence when PW4, PW5 and PW8 were being cross-examined. Yet that crucial element involving Abdul Gamal Nasir was not put to any of those witnesses. Indeed when they were being cross-examined the name Abdul Gamal Nasir was not mentioned at all and not even a question about Abdul Gamal Nasir was asked. In fact a totally different character emerged in the cross-examination of PW4. The defence put to PW4 that a person named Zali who had been arrested gave information about Sakri. This is mind boggling. Another crucial element in Sakri's defence which was closely related to the first element is that when he was arrested he was carrying a red plastic bag and not the bag P10, and that he had dropped the red plastic bag because he was scared as it did not belong to him. This second element was also never put to PW4, PW5 and PW8. It was put to PW8 that the 'barang kes' was found in motorcar JEQ 8145, but not even one question about the red plastic bag was asked in the cross-examination of PW4, PW5 and PW8. If the story about the red plastic bag was true there was no reason why the defence overlooked it when PW4, PW5 and PW8 were cross-examined. It surfaced for the first time when Sakri gave evidence in his defence. In the circumstances, we cannot help but conclude that Sakri's story about Abdul Gamal Nasir requesting him to deliver jamu to a blue Proton Saga which was waiting near the bus stop was nothing more than an afterthought on his part. But then, in a criminal trial, the prosecution carries the burden of proving the accused's guilt right to the end of the case. Thus, failure on the part of defence to put its case as we have just explained, can never by itself, relieve the prosecution of its duty of establishing the charge against Sakri beyond reasonable doubt (*see Alcontara v Public Prosecutor*). Even if we are not convinced of the truth of his story we have to consider whether his defence did nevertheless raise a reasonable in our mind as to his guilt.
- G [20] Returning to Sakri's defence, although on the evidence adduced by the defence, Abdul Gamal Nasir was not a fictitious character and that he was the registered owner of motorcar JEQ 8145, we find Sakri's story about the red plastic most baffling. In the first place, if it is true that Nasir wanted Sakri to deliver the red plastic bag to Sakri, why did Nasir not make the request when Sakri came to take the car? Why must Nasir wait until Sakri was on the way to Masai? Next, according to Sakri while driving the car to Masai, he received a telephone call from Nasir asking for his help to deliver a red plastic bag which was on the rear seat of the car:
- I Semasa saya pandu kereta dan dalam perjalanan saya ada dapat panggilan telefon daripada Abdul Gamal Nasir — semasa memandu kereta. Abdul Gamal Nasir minta pertolongan dari saya untuk hantar beg plastik warna merah yang berada di tempat duduk belakang dalam kereta. Semasa saya ambil kereta saya tidak nampak apa-apa barang dalam kereta.

In other words, when he took the car he did not see anything in it. Later in his examination-in-chief Sakri said:

A

Saya pergi parking di belakang bus stop berhampiran rumah flat. Jarak dari parking ke bus stop lebih kurang 50 meter. Selepas saya berhentikan kereta saya ada nampak beg plastik merah di dalam kereta. Kemudian saya ambil beg plastik tersebut dan berjalan ke arah Proton Saga Biru di kawasan bus stop.

B

The question is if he did not see anything in the car when he took it, who put the red plastic bag in the car and when? Thirdly, the place where the blue Proton Saga was waiting was a bus stop (shown in photographs P32 C and D, p 181 of the appeal record), and not a bus station. According to Sakri, when he arrived at the bus stop he saw the blue Proton Saga waiting for him. He stopped the car alongside the Proton Saga and honked the horn. The person in the blue Proton Saga acknowledged him by raising his hand. Sakri then drove the car and parked it at place about 50 meters from the bus stop. In his evidence Sakri said when he saw the blue Proton Saga at the bus stop, there was no other vehicle there:

C

D

Pada hari tersebut semasa saya sampai bus stop saya nampak Proton Biru sahaja. Tidak ada lain kereta di situ.

E

So, if Sakri's story about the waiting blue Proton Saga is true, he could have easily parked the car behind or in front of that Proton Saga, got down, and delivered the red plastic bag instead of parking the car some 50 meters away and then walked back to the Proton Saga to deliver the red plastic bag. In Sakri's own word it would have taken him less than a minute to do so. Fourthly, according to Sakri, when he was arrested he released the red plastic bag because he was scared as the bag did not belong to him. That in our view is too flimsy an explanation to be worthy of credence. In his own evidence Sakri said he was asked to deliver the *barang* which Nasir said contain '*jamu*' — not some contraband. So, Sakri really had no reason to be scared.

F

G

[21] In the end Sakri's story is nothing but a bare denial. He did not deny walking to the bus stop but denied that he was carrying the bag P10 containing the proscribed drug and that he threw the bag onto the road on being accosted by PW4. Sakri claimed that he was carrying a red plastic bag which contained '*jamu*'. He claimed that the bag P10 was found in the boot of Nasir's car to which he was dragged after he was arrested. Sakri's evidence is thus diametrically opposed to the evidence of PW4 and PW5. Sakri's evidence implies that PW4 and PW5 had colluded in giving false evidence to frame-up Sakri by testifying falsely that Sakri was seen carrying the plastic bag P10 in his hand and later throwing it onto the road on being accosted by PW4. Sakri's evidence also implies that PW4 and PW5 falsely suppressed evidence relating to the existence of the red plastic bag as well as the black hand bag which Sakri claimed was recovered from the boot of the car. There is no evidence that Sakri

H

I

- A knew any of the police officers who arrested him. In fact he said he assumed that they were police personnel. There is also nothing to show that Sakri had any quarrel with any of them prior to the date of this arrest. In such circumstances there is no plausible reasons for them to want to falsely implicate Sakri in a charge which would attract the death penalty upon conviction. PW4
- B and PW5 had given evidence on what they witnessed and did on the day in question in the exercise of their official duty. We have re-evaluated Sakri's evidence in the light of the evidence adduced by the witnesses for the prosecution and subject them to critical examination. We find that Sakri had failed to rebut on the balance of probabilities the presumption of trafficking
- C under s 37(da) of the DDA which arose against him. We also find that that he had failed to raise any reasonable doubt in our mind as to his guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the case of trafficking against Sakri as charged. The learned trial judge had therefore not erred in finding him guilty of the charge, convicting him and sentencing him
- D to death.

[22] In the result Sakri's appeal is dismissed. The conviction and sentence against him are affirmed.

- E *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

F

G

H

I